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No. 94-1297

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In The

Supreme Court of the United States

October Term, 1994

THOMAS J. LONGO, DAVID E. MACK, NANCY J. MARINCIC, ROSE MARIE LOVANO, JOSEPH SUSTER, MICHAEL ABELLA and WILHELM G. SPIEGELBERG, in Their Individual Capacity,

Petitioners,

vs.

GEORGE ZILICH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Respondent provided competent, admissible evidence in response to the Petitioners' Motions for Summary Judgment establishing a genuine issue of fact as to whether the actions of the Petitioners were retaliatory conduct "under color of" law prohibited by the First Amendment and by 42 U.S.C. § 1983.

2. Whether the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Northern District of Ohio, Eastern Division, properly denied the Petitioners' Motions for Summary Judgment since genuine issues of material fact remained.

3. Whether the United States Court of Appeals for the Sixth Circuit properly remanded the issues to the District Court to determine which of the Petitioners should remain in the case on the Respondent's First Amendment retaliatory harassment claims.

LIST OF PARTIES

All parties in the proceedings before the United States Sixth Circuit Court of Appeals are listed in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions, Statutes and Ordinance Involved	3
Statement of the Case	3
A. Procedural History	3
B. Statement of Facts	5
Reasons for Denying the Writ	10
I. The Respondent provided admissible, relevant evidence establishing that the conduct of the Petitioners were retaliatory acts prohibited by the First Amendment and were taken "under color of" law as proscribed by 42 U.S.C. § 1983.	10

Contents

Page

II. The District Court and the Sixth Circuit Court of Appeals applied the appropriate summary judgment standards in denying the Petitioners' motion for summary judgment. 13

III. The United States Court of Appeals for the Sixth Circuit properly remanded the issue to the trial court and directed the court to determine which Petitioners should remain in the case on the Respondents' First Amendment claim. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 13

Fraternal Order of Police Hobart Lodge 121, Inc. v. Hobart, 864 F.2d 551 (7th Cir. 1988) 11

Kennedy v. City of Cleveland, 797 F.2d 296 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 3

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985) 3

Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972) 11

Contents

	Page
Reichert v. Draud, 701 F.2d 1168 (6th Cir. 1983)	11
United States v. Diebold, 369 U.S. 654 (1962)	14
United States v. Hodges, X-ray, Inc., 759 F.2d 557 (6th Cir. 1985)	14
Statutes Cited:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	3
28 U.S.C. § 1331	4
28 U.S.C. § 1343	4
42 U.S.C. § 1983	i, 10
United States Constitution Cited:	
First Amendment	i, 4, 5, 10, 11, 14

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, George Zilich, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by

Petitioners, Thomas J. Longo, David E. Mack, Nancy J. Marincic, Rose Marie Lovano, Joseph Suster, Michael Abella, and Wilhelm G. Spiegelberg.

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the United States District Court, Northern District of Ohio, Eastern Division, which denied the Petitioners' Motion for Summary Judgment on the Respondent's First Amendment retaliatory harassment and qualified immunity claims is reported in *Zilich v. Longo*, 34 F.3d 359 (1994) and is reproduced in the Petitioners' Appendix to the Petition for Writ of Certiorari. (App. A, 1-15). Following issuance of the Sixth Circuit's Opinion, the Petitioners moved for a rehearing, or in the alternative, rehearing *en banc*. The Sixth Circuit denied the Petitioners' request. The Order denying the request for rehearing is not published but is reproduced in the Petitioners' Appendix to their Petition for Writ of Certiorari. (App. A, 16-17).

The Judgment Entry and Memorandum Opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported but is reproduced in the Petitioners' Appendix to their Petition for Writ of Certiorari. (App. A, 18-49).

STATEMENT OF JURISDICTION

The United States Supreme Court's jurisdiction to review the September 1, 1994 judgment of the United States Court of Appeals for the Sixth Circuit is conferred pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Sixth Circuit Court of Appeals to

review the interlocutory appeal on the issues of the Petitioners' denial of qualified immunity is authorized by *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985) and *Kennedy v. City of Cleveland*, 797 F.2d 297 (Sixth Circuit 1986), *cert. denied*, 479 U.S. 1103 (1987). Jurisdiction of the Sixth Circuit was invoked pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED

In addition to the constitutional provisions mentioned by the Petitioners, Respondent submits the following to this Court:

Garfield Heights Ordinance No. 112-1991 provides in pertinent part:

> An Ordinance Authorizing and Directing the Director of Law to take whatever action is necessary, *legal or otherwise*, to collect the salary received by former Councilman George Zilich during his previous two year term as councilman at which time he was intentionally violating Section 9 of the Charter of the City of Garfield Heights.

(Emphasis supplied).

STATEMENT OF THE CASE

A. Procedural History

Respondent ("Respondent" or "Zilich") served as a councilman for the City of Garfield Heights from November 1989 until November 10, 1991. During his two years in office the Petitioner was personally threatened, his property vandalized and his family terrorized. This terror campaign was authorized and

conducted by the City's Mayor, Thomas J. Longo, Law Director, David E. Mack, Assistant Law Director, Wilhelm G. Spiegelberg, and members of council to retaliate against the Petitioner for the exercise of his First Amendment right to free speech on issues of public concern.

In 1991 Respondent chose not to seek re-election due to the ongoing terror campaign against him. On November 11, 1991 the newly elected council — in its very first session and in its very first act — passed Ordinance 112-1991. The ordinance authorized the Law Director to take whatever action was necessary, *"legal or otherwise"*, to recoup the Respondent's pay due to the Respondent's alleged intentional violation of Section 9 of the Charter of the City of Garfield Heights. The City officials' campaign to destroy Respondent personally and politically carried the full force and effect of the law in the City of Garfield Heights. The threat to his person, property and possessions was made a matter of law.

On January 13, 1992 Respondent filed suit in Cuyahoga County, Ohio. The Petitioner removed the action to the United States District Court, Northern District of Ohio, Eastern Division pursuant to the District Court's jurisdiction provided in 28 U.S.C. §§ 1331 and 1343. The Respondent's amended Complaint alleged due process, equal protection, First Amendment and Bill of Attainder constitutional claims as well as a state law defamation claim.

The Petitioners filed three Motions for Summary Judgment on the claims. The motions were denied by the District Court on the Bill of Attainder, First Amendment and defamation claims. The equal protection and due process motions were granted. The Petitioners were denied qualified immunity.

The Petitioners appealed the qualified immunity issue to the

United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's holding that trial should ensue on the Respondent's First Amendment claims based upon the City officials' retaliation against the Respondent by their physical threats, vandalism and harassment.[1] Petitioner's request for rehearing and/or rehearing *en banc* were denied on November 3, 1994.

B. Statement of the Facts

On November 11, 1991 the culmination of two years of assault on the Respondent's constitutional rights resulted in the passage by the Garfield Height City Council of Resolution 54-1991 and Ordinance 112-1991. On the very first night of the new term the Petitioners took it upon themselves to defame the Respondent and continue the official policy of the City of Garfield Heights to engage in retaliatory acts against the Respondent.

The Petitioners' entire basis for their Petition for Writ of Certiorari is their allegation that the retaliation taken against the Respondent was carried out anonymously. The record reveals otherwise. The District Court and the Court of Appeals had competent, relevant, and admissible evidence before them to justify their conclusions denying the Motions for Summary Judgment.

The evidence considered by the District Court in deciding the Motions was voluminous. The joint appendix before the Court of Appeals contained 1,199 pages. The Respondent

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1. The Sixth Circuit Court of Appeals also reversed the trial court's holding on the Respondent's Bill of Attainder and First Amendment claims based upon the Ordinance and Resolution. The Respondent has filed a Petition for Writ of Certiorari with this Court. *See* Petition for Writ of Certiorari No. 94-1313 filed and docketed in the Court on February 1, 1995.

furnished affidavits along with the deposition transcripts of himself, the Petitioners and several key witnesses. Those transcripts included the testimony of Thomas Furth ("Furth"), the former Assistant Law Director for the City of Garfield Heights; Sean Berney ("Berney"), the former Law Clerk for the City of Garfield Heights; and, Jean Mazur ("Mazur"), the Secretary to Law Director David Mack ("Mack").

In summary, the evidence before the District Court included the testimony of Respondent regarding the threatening phone calls he received, the vandalism to his car when his window was shot out and his tires were slashed, the vandalism to his home, the threat of the Safety Director, the threats by Mayor Longo directed to him, the threats to his family and the use of the residency issue to harass him. His testimony detailed the timing of these events which corresponded to his speaking out on positions opposing the Mayor's and certain councilmembers' positions on matters important to the City.

The evidence linking the Petitioners to these retaliatory actions is provided by the deposition transcripts of Furth, Berney and Mazur. Furth testified he was told by Mayor Longo and Law Director Mack upon his hire that his role was politics, re-electing Longo, and prosecuting "niggers". Furth testified regarding the admissions made by Longo, Mack and Spiegelberg that they were out to destroy Zilich personally and politically and that they would "shut him up" permanently by whatever means necessary.

Furth's testimony linked Longo to unauthorized expenditures of Garfield Heights' employees' time and expense in researching the Zilich "residency" issue. His testimony also related that Longo knew that this issue was legally dead but authorized using it to harass Zilich in the continuing effort to squelch Zilich's speech.

Furth's testimony regarding several meetings held by the Mayor and the Law Director on City property and on City time in which plans were discussed on how to get Zilich, retaliate against him and permanently shut him up evidenced the outrageous conduct of these City officials toward Zilich. The timing of the meetings coincided with the testimony of Zilich regarding his speech on issues in opposition to the Mayor and his cohorts.

Furth's testimony is so compelling that it is specifically referred to in a four page appendix to the District Court's Opinion. (*See* Petitioner's Petition for Writ of Certiorari, Appendix A, 44-48). His testimony presents his eyewitness account of the actions of the officials of the City and relates (1) discussions of the Petitioners regarding the use of the residency issue to harass Zilich; (2) use of law department employees to write letters for citizens to raise the issue on residence to harass Zilich; (3) details regarding various meetings at which time the issues on how to stop Zilich, how to sick Spiegelberg on Zilich, and to conduct a dirty tricks campaign against Zilich be implemented; (4) admissions by Spiegelberg made to Furth that the dirty tricks campaign had been implemented which included phone calls Spiegelberg made to Zilich at all hours of the day and night and especially when his wife was home alone; and (5) statements made by the Mayor to "take care" of Zilich, to drive him out of town, to do whatever it takes to interfere with his employment, to attack Zilich and to terrorize Zilich and his wife.

Furth's testimony includes the detailed admissions by Spiegelberg and his efforts to terrorize Zilich and his wife at the instruction of the Mayor.

Furth also details a major meeting of the law department held immediately after council had held a special meeting regarding a possible investigation into alleged irregularities in the law department. This meeting was held at a Garfield Heights building

and was attended by Mayor Longo, Law Director Mack, Assistant Law Director Spiegelberg, Assistant Law Director Stackowitz, and Assistant Law Director Furth. His testimony was a first-hand account of what went on. The discussion at the meeting focused on the law department's retaliation for Zilich's perceived criticism. It focused on how to destroy him, drive him out of the City and politics permanently and how to harm him physically. Longo followed up this major meeting with a discussion with Furth seeking his assistance to hire someone to break Zilich's legs. Longo also talked of destroying Zilich, intimidating him and his wife and driving him out of the City. Furth's testimony included the details of Longo's statements to him. It included:

> He [Longo] indicated that George's [Zilich's] wife was a whore and that what she needed was a good fuck because obviously George Zilich couldn't provide that. Well, how would she feel and would George feel if he [Longo] found some people that could provide that and drag her out of her house and took care of her, and that maybe then pretty boy and the barbie-doll couple would be out of Garfield Heights once and for all and understand that the people of Garfield Heights are not like them and they're not like the people of Garfield Heights.

Furth's testimony relates specific admissions made by Longo, Mack, and Spiegelberg that they were carrying out their plan to take care of Zilich, chase him out of town, and that Spiegelberg had been the one to make the phone calls.

The testimony of Jean Mazur, the former secretary to David Mack and the law department corroborated much of Furth's testimony. Mrs. Mazur testified that Spiegelberg had commented about the vandalism to Zilich's car. She testified to comments

made by Mayor Longo in her presence that he wanted Zilich out of Garfield Heights, that he would sick Spiegelberg on Zilich and that he wanted to shut Zilich up and tear out his throat. She heard Longo's comments regarding taking Zilich out back, slapping him around and teaching him a lesson once and for all. She testified that the legislation on the residency issue in March of 1991 was designed to retaliate against Zilich. Berney corroborated much of Furth's and Mazur's testimony.

The compelling testimony contained in the record before the District Court establishes that the Petitioners' actions were anything but anonymous. They were directly linked to the City's public officials and were taken in retaliation to Zilich's exercise of his First Amendment rights. The actions were established as taken by Garfield Heights' public officials who used their public offices in an attempt to destroy the rights of a citizen to speak out.

Finally, the Petitioners retaliate against the Respondent and harass him even after leaving public office. The Petitioners pass the Ordinance and Resolution defaming him and authorizing the law director to continue the physical threats, harassment and vandalism — what other interpretation can be attributed to providing the law director with the authority to take whatever action is necessary, "legal or otherwise", to pursue the Respondent's back pay? The Sixth Circuit Court of Appeals recognized the threatening nature of the Resolution and Ordinance when the court held:

> In light of the Resolution and Ordinance demonstrating hostility toward the plaintiff, these allegations, if proved, are sufficient to support a conclusion that defendants were acting under color of official right.

(App. A, 14-15).

REASONS FOR DENYING THE WRIT

No special or important reasons exist favoring review of the Sixth Circuit's Opinion. Contrary to the Petitioners' assertions, the decision on the First Amendment retaliatory claims is nothing more than the application of well-settled principles to the fact situation presented to the court. No conflict is evident with either other Circuit decisions or United States Supreme Court decisions. The Sixth Circuit correctly rejected the Petitioners' "anonymous" acts argument, applied the appropriate summary judgment standards and acted properly in remanding the case to the District Court for trial. None of the issues alleged by the Petitioners requires review by this Court.

I.

THE RESPONDENT PROVIDED ADMISSIBLE, RELEVANT EVIDENCE ESTABLISHING THAT THE CONDUCT OF THE PETITIONERS WERE RETALIATORY ACTS PROHIBITED BY THE FIRST AMENDMENT AND WERE TAKEN "UNDER COLOR OF" LAW AS PROSCRIBED BY 42 U.S.C. § 1983.

The Petitioners' have alleged that the threats, vandalism and physical harassment which occurred in this case were anonymous, not linked to the Petitioners, and not taken under color of law. Their argument lacks merit, especially when viewed in light of the evidence before the District Court which the Petitioners have chosen to ignore. The evidence included: (1) Respondent's testimony regarding Mayor Longo's threats made directly to him; (2) Furth's testimony regarding the admissions of the individual Petitioners to their involvement in planning and carrying out the terrorization campaign as well as their admissions to Furth of their responsibility for the acts occurring; (3) the Petitioners' deposition admissions that the threats and

plans occurred but they were only jokes; (4) the extensive evidence that the acts were carried out on City time at City expense and in their official and individual capacities; (5) the testimony of Jean Mazur regarding admissions made by the Petitioners to their involvement in the threats, anonymous phone calls and efforts to retaliate against the Respondent; and, (6) the hostility evidenced by the Ordinance and Resolution.

The protections of the First Amendment extend to retaliatory actions designed to punish the exercise of the right to free speech. *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694 (1972). Retaliatory acts by public officials against the exercise of First Amendment rights is " . . . itself a violation of the First Amendment." *Fraternal Order of Police Hobart Lodge 121, Inc. v. Hobart,* 864 F.2d 551, 553 (7th Cir. 1988), *see also, Reichert v. Draud,* 701 F.2d 1168, 1170 (6th Cir. 1983).

The Sixth Circuit correctly held:

> The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional, and "retaliation claims" have been asserted in various factual scenarios. *Meyers v. City of Cincinnati,* 979 F.2d 1154 (6th Cir. 1992) (firemen dismissed); *Boger v. Wayne County,* 950 F.2d 316 (6th Cir. 1991) (county employee in Medical Examiner's Office transferred); *Draud,* 701 F.2d at 1170 (change in public school teacher's duties); *Hildebrand v. Board of Trustees,* 662 F.2d 439 (6th Cir. 1981) (university professor denied tenure), *cert. denied,* 456 U.S. 910, 102 S. Ct. 1760, 72 L. Ed. 2d 168 (1982); *Johnson v. Avery,* 393 U.S.

> 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969) (prisoner retaliated against for seeking access to courts). No reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment and vandalism.

United States Sixth Circuit Court of Appeals decision appended to Petitioners' writ at App. A, 14-15.

The requirement of acting "under color of" law was amply demonstrated before both the District and Sixth Circuit Courts. Evidence of Petitioners' actions taken in their official capacities, *i.e,*. unauthorized research of the residency issue, planning and conspiring to retaliate against the Respondents on City time in City offices, the admissions of the Petitioners in carrying out their plans, all clearly establish their actions were taken under the pretense of their official capacities. The actions of the Petitioners were carried out while purporting to act under the authority of their positions. The Petitioners' conduct along with the Ordinance and Resolution reflects the official hostility and retaliatory position of the City and its major representatives in carrying out their retaliation.

Even a cursory review of the evidence before the District and Sixth Circuit Courts reveals that ample evidence of the Petitioners' involvement under color of law exists. The Sixth Circuit applied the appropriate legal standards. No issue of importance is presented in the Petition for Writ of Certiorari.

II.

THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS APPLIED THE APPROPRIATE SUMMARY JUDGMENT STANDARDS IN DENYING THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT.

The appropriate standards for review of the Petitioners' motion for summary judgment were applied in this case. In a motion for summary judgment the judge's function is not " . . . himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). As this Court has stated:

> [t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Ibid., 477 U.S. at 250.

Further, when considering a motion for summary judgment

> . . . the inferences to be drawn from the underlying facts contained in [affidavits], pleadings, depositions, answers to interrogatories and admissions must be viewed in the light most favorable to the party opposing the motion.

United States v. Diebold, 369 U.S. 654, 655 (1962); *United States v. Hodges, X-ray, Inc.*, 759 F. 2d 557 (6th Cir. 1985).

In the instant case the Respondent presented competent, relevant and admissible evidence establishing the elements of his cause of action. As stated above, the testimony of Furth relating the admissions of the Petitioners in their involvement in planning and carrying out the acts of retaliation is clearly admissible. In fact, the deposition is cited by the District Court and referred to by the Sixth Circuit. The evidence of the threats, calls, vandalism and terror campaign as testified to by Zilich and Furth, admitted to by the Petitioners, and corroborated by the law director's secretary directly links the Petitioners to the prohibited activities.

The Sixth Circuit correctly rejected the Petitioners' "anonymous" argument. The Petitioners' allegations present no issue worthy of review by this Court.

III.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY REMANDED THE ISSUE TO THE TRIAL COURT AND DIRECTED THE COURT TO DETERMINE WHICH PETITIONERS SHOULD REMAIN IN THE CASE ON THE RESPONDENTS' FIRST AMENDMENT CLAIM.

While the Petitioners allege the Sixth Circuit erred in remanding the issue of which of them are entitled to dismissal in light of the Sixth Circuit's decision, they fail to cite any authority supporting that allegation. This is not surprising since there is none. The authority of the Court of Appeals to remand issues to the District Court is an inherent power which need not be addressed. No significant issue is raised justifying review by this Court of the Sixth Circuit's order of remand.

CONCLUSION

The Respondent requests this Court deny the Petition for Writ of Certiorari. The case presents no issues appropriate for the Court's review. The lower court's holdings are not in error but are, rather, appropriate applications of precedents established by this Court. The petition should be denied.

Respectfully submitted,

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